UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DENNIS A. SCHNEIDER, Petitioner, vs. RUSSELL B. JERGENS, PALO ALTO COUNTY SHERIFF, Respondent,	No. C02-3056-MWB **REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS**

After several motions to dismiss and the filing of an Amended Petition, this matter now is before the court on the merits of the petition for writ of habeas corpus filed by the petitioner Dennis A. Schneider ("Schneider"). The court will begin by setting forth the factual and procedural background that brings Schneider's Amended Petition before the court.[1] Because Schneider, in his Amended Petition, raises constitutional challenges to a state no-contact order, the court will focus on the constitutional issues Schneider raised in the state courts of Iowa.

I. FACTUAL AND PROCEDURAL BACKGROUND

Schneider and his former wife, Debra, were divorced on March 26, 1998, in Palo Alto County, Iowa. On September 8, 1998, Debra sought a permanent injunction and

---

[1] The petition before the court for review is Schneider's "Amendment A" (Doc. No. 60). *See* Doc. No. 63, in which Chief Judge Bennett specified which version of his amended petition Schneider was authorized to file.

restraining order to keep Schneider away from her and her property. Debra claimed Schneider had engaged in various acts of harassment and intimidation, and claimed she was in fear of him. After a hearing, Palo Alto County District Court Judge John P. Duffy entered an order that provided as follows:

> IT IS THEREFORE ORDERED that [Schneider] shall stay away from [Debra's] residence, [and] place of employment, and he is hereby enjoined and restrained from entering upon any premises occupied by [Debra], [and] from interfering with, molesting, annoying or otherwise contacting [Debra] at any place whatsoever.
>
> IT IS FURTHER ORDERED that any necessary contact between the parties for visitation shall be made through the children themselves. Petitioner may contact the children to arrange visitation.

Respondent's Appendix, Doc. No. 76, tab 5 (Ruling on Application for Restraining Order filed Apr. 1, 1999) (the "No Contact Order").

At the time the No Contact Order was entered, Schneider was living in Emmetsburg, Palo Alto County, Iowa, where he maintained an established veterinary practice. Debra was working at Security National Bank in Sioux City, Iowa.

On October 18, 1999, Schneider was arrested by officers of the Spirit Lake Police Department and charged with harassing Debra, who alleged Schneider had approached her at a high school football game, yelled at her, and made rude comments to her. On October 29, 1999 (filed November 1, 1999), the District Court in and for Dickinson County, Iowa, entered a No Contact Order (the "second No Contact Order") that provided, in pertinent part, as follows:

> [Schneider] shall have no contact of any nature, to include in person, by telephone, in writing, or otherwise, with [Debra] (Protected Party) and shall not be on or adjacent to the residence or place of employment of the protected party.

Doc. No. 76, Tab 9, "No Contact Order," ¶ 1. The second No Contact Order listed a Sioux City, Iowa, address for Debra, but did not list an employment address.

On December 20, 2000, the State of Iowa entered into a deferred prosecution agreement with Schneider as to the Dickinson County harassment charge against him. Doc. No. 76, Resp. App., Tab 9; *see id.*, Tab 12. The agreement provided that if Schneider complied with the second No Contact Order for six months, the criminal charges would be dismissed. Doc. No. 76, Resp. App., Tab 9.

On March 17, 2000, Schneider was charged in Clay County with an aggravated misdemeanor for violating the second No Contact Order. Debra alleged Schneider had harassed her and attempted to humiliate her in public after a sporting event. The charge was reduced to a simple misdemeanor, and the case came on for trial on June 1, 2000.

At the close of the State's evidence in the trial, Schneider's attorney moved for a judgment of acquittal, and he filed a written motion and supporting brief. In the motion, Schneider argued the act underlying the criminal charge consisted solely of speech. He noted freedom of speech is protected by both the United States and the Iowa constitutions, and the Iowa Supreme Court has recognized "that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." Doc. No. 77, unnumbered p. 7 (Motion & Brief for Judgment of Acquittal) (quoting *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989), in turn quoting *City of Houston v. Hill*, 482 U.S. 451, 472, 107 S. Ct. 2505, 2515, 96 L. Ed. 2d 398, 418 (1987)).

The Clay County magistrate judge who presided over the contempt hearing acknowledged Schneider's argument that the No Contact Order "abridged some right of [his] to exercise free speech." Doc. No. 76, Tab 11, unnumbered p. 32; *see id.*, unnumbered p. 30 (Schneider's attorney summarizing arguments in written Motion and

Brief for Judgment of Acquittal). In denying Schneider's motion, the Clay County magistrate judge noted, "I'm not aware that No Contact Orders or Writs of Injunction issued either in civil or criminal matters either domestic related or not, which restrict people from certain activity including that which involves speech[, are] violative of their constitutional right to free speech. . . ." *Id.*, unnumbered p. 32. Schneider was convicted of the charge, and was sentenced to seven days in jail, but he was given a work release to continue his veterinary practice. Doc. No. 76, Tab 9, Judgment in SM003104.

Schneider's conviction was affirmed on appeal by Associate District Judge Donavon D. Schaefer. Doc. No. 76, Tab 10, Ruling on Appeal dated Sept. 5, 2000. Judge Schaefer did not address Schneider's constitutional argument in his ruling. *See id.*

Schneider appealed Judge Schaefer's ruling, and District Judge Joseph J. Straub again affirmed the conviction. Doc. No. 76, Tab 9, Ruling on Appeal dated Jan. 26, 2001. Judge Straub did address Schneider's constitutional challenge to the No Contact order in his ruling, holding as follows, in pertinent part:

> Because [Schneider] has raised a constitutional issue (freedom of speech) the standard of review to be applied by the court is for the Court to conduct its own evaluation of the totality of circumstances. This is the equivalent of a de novo review. State v. Akright, 506 N.W.2d 465, 467 (Iowa App. 1993). The Court has reviewed the entire transcript of the hearing before Magistrate Whittenburg.
>
> In determining whether the trial court's factual conclusions are supported by substantial evidence, the appellate court must examine the evidence to determine whether a rational trier of fact could have found the defendant guilty of the offense charged. State v. Eickelberg, 574 N.W. 1, 3 (Iowa 1997).
>
> In this case the evidence supports a finding of the following facts:

. . .

4. On March 10, 2000, [Schneider] was at his son's basketball game at the YMCA in Spencer, Iowa, with a friend, Kris Roeber. Debra Rodgers is the mother of [Schneider's] son who was playing in the basketball game.

5. Also attending the basketball game was Debra Rodgers. She was there with a friend, Jim Knight, and Jim Knight's son, James, who was nine years old. She also was there to see her son play.

6. There was no contact between [Schneider] and Debra Rodgers during the basketball game, but as Debra Rodgers and the Knights were walking toward their car after the game, [Schneider] drove by them slowly, lowered his window and asked in a loud voice, "Why don't you ask her how many abortions she's had?" or words to that effect.

7. Debra Rodgers found [Schneider's] statements to be annoying to her.

8. On a prior occasion [Schneider] had confronted Mr. Knight and on that occasion he also made comments about Ms. Rodgers having had abortions.

9. After the incident outside the Spencer YMCA, the protected party, Ms. Rodgers, reported the incident to the Spencer Police Department. The Spencer Police investigated and found out that two restraining orders were in effect at that time. . . . [T]he present charge was filed for a violation of the Palo Alto County restraining order and writ of injunction issued by Judge Duffy.

> 10. The comment made by [Schneider] from his automobile was he slowly drove past Ms. Rodgers, Mr. Knight and Mr. Knight's son was intended to annoy and harass Ms. Rodgers.
>
> [Schneider] also argues that the conviction is a violation of his First Amendment right to freedom of speech. In Shedlock v. Polk County District Court, 534 N.W.2d 656, 660 (Iowa 1995), the Supreme Court discussed the delicate balance that must be used in crafting a protective order that will not violate a person's First Amendment rights. This Court concludes that Judge Duffy's order struck such a balance. [Schneider] was forewarned. Any adult of normal intelligence could tell from Judge Duffy's order what is and what is not acceptable behavior. It is clear that [Schneider's] remark, even though it may have been directed to Mr. Knight, was intended to annoy and harass Ms. Rodgers. That amounted to a "contact" with Ms. Rodgers and did not violate [Schneider's] First amendment rights.

Id., pp. 2-4.

On June 14, 2000, the Dickinson County Attorney filed an application to set the Dickinson County harassment charge for trial because Schneider had violated the terms of the deferred prosecution agreement. Doc. No. 76, Resp. App., Tab 12. On June 11, 2001, Schneider pled guilty to the harassment charge. He paid a fine, and the second No Contact Order of October 29, 1999, was extended to remain in place until July 11, 2006. *See* Doc. No. 75, p. 9.

On August 31, 2001, Debra filed an application in the Palo Alto County District Court, seeking to have Schneider found in contempt of the No Contact Order. In the application, Debra recited Schneider's two criminal convictions – the one for harassment in Dickinson County, and the one for violating the second No Contact Order in Clay

County – and she alleged Schneider had committed other acts of harassment since his convictions. Among other things, Debra alleged as follows:

> 5. In January 2001, [Schneider] sued his daughter, Dianna Lynn Schneider, for the return of a 1992 Sunbird automobile that had been titled in the names of Dennis and Dianna Schneider. . . . That vehicle had previously been subject to the Stipulation and Order in [the divorce action]. On April 2, 2001, the Small Claims court denied his Petition, and awarded the car to Dianna Schneider. The Court found that a completed gift had been made by the parties to Dianna Schneider. The Court's order provided that "this opinion may act as a transfer of the property from Dennis Schneider and Dianna Schneider to Dianna Schneider." Relying thereon, Dianne Schneider obtained a new title from the Palo Alto County Treasurer in April 2001.
>
> 6. On July 7, 2001, [Schneider] entered [Debra's] place of employment, the Smith Wellness Center, in Emmetsburg, Iowa, contrary to [the No Contact Order]. Dianna Schneider was working there at that time, and [Debra] was "on call". [Schneider] set down the title to the Pontiac Sunbird, and told Dianna he had sued her to prove to [Debra] that the car was his from the dissolution. Dianna asked him to leave. [Schneider] became more upset, and told Dianna that he had his mother change her Will so that Dianna and her brother and sister would not receive the family farm. Dianna again asked him to leave, and [Schneider] became more incensed. [Schneider] stated that if he wanted the Pontiac convertible, he could take it, and that Dianna should "watch out" because he could "burn her convertible top down". [Schneider] finally left.

Doc. No. 76, Tab 6, Contempt Application, ¶¶ 5 & 6. Debra argued Schneider was in violation of the No Contact Order because he had entered her place of employment. *Id.*, ¶ 7.

Schneider filed a Response to Debra's contempt application, in which he set forth the following "affirmative defenses":

> c. To the extent that the [No Contact Order] of April 1, 1999, or any other order denies [Schneider] the right to enter a public place, when there is no threat or danger to any person therein, said order violates [Schneider's] right to travel, right to due process of law and equal protection under the laws, and the protections of Article I sections 1 and 6 of the Iowa Constitution and the Fourteenth Amendment to the United States Constitution and federal laws.
>
> . . .
>
> f. To the extent that any Order, attempts to restrain [Schneider] from being at a location where [Debra] is present, the Order is in violation of the Fourteenth Amendment to the United States Constitution and Article I sections 1, 6, and 9 of the Iowa Constitution. Such language is impermissibly vague, and does not apprize [Schneider] of the locations that he is somehow precluded from entering or impermissibly denies [Schneider] access to places, in which [Debra] enters after [Schneider] has entered. The Order, when enforceable by contempt actions, can take away [Schneider's] rights to liberty, and thus vague, inarticulate, and in specific [sic] allegations that [Schneider] is prevented from being at any location where [Debra] is, fails to apprize [Schneider] of those acts that would be subject to loss of liberty [sic], because the acts subject to loss of liberty [sic] are within the sole discretion of [Debra].

Doc. No. 76, Tab 7, pp. 2-3, ¶ 8(c) & (f).

The Contempt Application came on for hearing on October 1, 2001. *See* Doc. No. 76, Tab 8, Transcript of hearing dated Oct. 1, 2001. On April 29, 2002 (filed May 1, 2002), Palo Alto County District Judge David A. Lester issued a Ruling on Debra's contempt application. *Id.*, Tab 14. Judge Lester held Schneider was in contempt of the No Contact Order, and he sentenced Schneider to thirty consecutive days in jail, to be

completed on or before August 1, 2002. He allowed Schneider to participate in work release subject to the jail's conditions. He also entered judgment in Debra's favor for $1,000 in attorney fees, and he assessed costs against Schneider in the amount of $225.08. *Id.*

In Judge Lester's ruling of April 29, 2002, he addressed Schneider's constitutional arguments as follows:

> Before getting to the actual merits of this matter, the court will first address some constitutional issues raised by [Schneider] in regard to the [No Contact Order] issued by the court of April 1, 1999. While urging basically the same argument using three different avenues, [Schneider] contends that the [No Contact Order] issued on April 1, 1999 was not sufficiently definite in its terms and [was] so vague as to not be enforceable by a contempt action. It is indeed well established that a party subject to the terms of an injunction must be able to determine from its provisions what actions the party may or may not do before the party can be held guilty of contempt for violating an injunction that is uncertain or ambiguous. Lynch v. Uhlenhopp, 248 Iowa 68, 72 (1956). It is equally well established that in assessing the constitutionality of a statute under a vagueness challenge, the test is whether "the challenged enactment was so vague that men of common intelligence must have necessarily guessed at its meaning or differed as to its application." See In Interest of Ponx, 276 N.W.2d 425, 431-42 (Iowa 1979). See also State v. Robinson, 618 N.W.2d 316, 314 (Iowa 2000).
>
> The court would first note that [Schneider] apparently made a similar argument in the appeal he filed with the district court in regard to the Clay County charge earlier discussed. At page 3 of his ruling on appeal, Judge Joseph Straub, in addressing [Schneider's] argument that the [No Contact Order] somehow violated his First Amendment right to free speech because it was too vague, concluded that "any adult of normal intelligence could tell from Judge Duffy's order what is and

> what is not acceptable behavior." (Ruling on Appeal, page 3, Clay County No. SMSM003104.) This court reaches the identical conclusion as Judge Straub. The order in question clearly advises [Schneider] that he is to stay away from [Debra's] place of employment. There are no limitations as to when and where the order applies, nor are any exceptions set forth in the order. Simply stated, the order prohibits [Schneider] from ever entering [Debra's] place of employment at any time. Therefore, the court concludes that Judge Duffy's order meets both the constitutional and legal tests for advising [Schneider] of what behavior is and is not acceptable. Accordingly, the court concludes that [Schneider's] vagueness challenges are without merit.

Id., pp. 8-9.

On May 9, 2002, in response to Judge Lester's ruling, Schneider filed a lengthy "Application for Reconsideration and Clarification of Facts Under the Provisions of Rule 1.904, Iowa Rules of Civil Procedure." Doc. No. 76, Tab 15. In his motion to reconsider, Schneider reasserted his First Amendment argument and also raised arguments that the No Contact Order, either on its face or as applied to him, was unconstitutionally vague; violated his constitutional rights to due process, freedom of association, protection of person and property, and travel; and amounted to an *ex post facto* law and punishment. *Id.* (esp. ¶¶ 38-40, 53-63.).

In particular, Schneider argued that when the No Contact Order was entered, Debra was working in Sioux City, Iowa. He claimed he had never been informed "beyond a reasonable doubt" that Debra worked for the Wellness Center, and the No Contact Order prevented him from inquiring about her place of employment. Schneider argued that prior to the filing of Debra's contempt application, he could only guess at where Debra was employed. He noted the No Contact Order did not provide any mechanism by which Debra could or should inform him of a change in her place of employment. He further

alleged that the building in which the Wellness Center is located is also the location for the public library in Emmetsburg, Iowa; he "knew or believed" Debra was not present in the building at the time he went to see his daughter; he had no intention of making contact with Debra when he took the car title to his daughter; and he believed he had the right to be present in the building for the purpose of delivering the car title to his daughter. *Id.*

Among other things, Schneider also argued that without a mechanism for notice to him of Debra's place of employment, she could be employed anywhere, including at the courthouse at the time of the hearing, and Schneider would be in violation of the No Contact Order simply by being present in such a place. Schneider argued that to the extent the No Contact Order would allow Debra to change her place of employment without notifying him of the change, subjecting him to potential imprisonment or other court action if he were present at Debra's place of employment, the No Contact Order violated his right to due process under the United States and Iowa Constitutions. *Id.* Schneider concurrently filed a motion for the court to stay its ruling on his application for reconsideration until a transcript of the contempt hearing had been generated, and until Schneider could supplement his application.

By order dated May 20, 2002, Judge Lester denied Schneider's motion for reconsideration/clarification in its entirety, holding, in relevant part, as follows:

> In reaching the determination to not enlarge or amend the court's ruling in accordance with the particulars set forth in [Schneider's] application, the court finds that the requested "clarifications" are, among other things, (1) not supported by evidence in the record; (2) assuming facts not in the record; (3) not relevant to the issues under consideration by the court; (4) contrary to the court's interpretation of the facts, and the law as applied to those facts; (5) constitute an expansion of Iowa law, particularly in the area of Constitutional law, not previously recognized in this state; (6) arguments previously

> addressed by the court; or (7) new arguments not previously raised by [Schneider], and therefore not properly considered as part of a Rule 1.904 motion.

Doc. No. 76, Tab 17, p. 2. Judge Lester also denied Schneider's motion to stay the proceedings pending receipt of a transcript of the contempt hearing.

Schneider filed a petition for writ of certiorari with the Iowa Supreme Court, and the petition was denied on June 26, 2002. *See* Doc. No. 1, Ex. 3.

On July 26, 2002, Schneider filed a petition in this court for relief pursuant to 28 U.S.C. § 2254. On August 15, 2002, a Motion to Dismiss was filed by "Debra Rodgers, on behalf of Russell B. Jergens, the Palo Alto County Sheriff." Doc. No. 4. The undersigned recommended that the motion be stricken because Rodgers was neither a party to nor an intervenor in this action. Judge Bennett denied the motion to dismiss on September 30, 2002, and set an Answer deadline. Doc. No. 8.

On November 1, 2002, the Respondent Russell B. Jergens ("Jergens") filed a motion to dismiss Schneider's petition as moot, noting Schneider had been released from custody, and he could not allege sufficient collateral consequences to maintain the action. Doc. No. 9. The undersigned recommended the motion be denied because the possibility of collateral consequences survived the mootness challenge. Doc. No. 11. On December 5, 2002, Judge Bennett denied Jergens's motion to dismiss, noting, however, that Jergens could reassert his mootness challenge to Schneider's claims after the development of a full record in the case. *See* Doc. No. 15.

The undersigned subsequently allowed the State of Iowa to intervene in the action, over the plaintiff's objection. On March 13, 2003, the State filed a motion to dismiss Schneider's petition, arguing one of Schneider's grounds for relief -- a constitutional challenge to Iowa Code section 665.11 -- was procedurally defaulted, unexhausted, and failed to state a claim for which relief could be granted. Among other things, the State

argued Schneider's petition was a"mixed petition," containing both exhausted and unexhausted claims, and therefore the petition should be dismissed. Doc. No. 35. Jergens joined in the motion to dismiss. Doc. No. 38.

On June 11, 2003, the undersigned recommended the motion to dismiss be denied, and further recommended the question regarding the constitutionality of the statute be certified to the Iowa Supreme Court. Doc. No. 52.

On June 26, 2003, Judge Bennett overruled the undersigned's recommendation, granted the State's motion to dismiss, and dismissed Schneider's petition without prejudice. However, Judge Bennett stayed the dismissal to July 31, 2003, to allow Schneider to dismiss the unexhausted constitutional claim and proceed on his exhausted claims, if he so desired. Doc. No. 55.

On July 30, 2003, Schneider filed a motion to amend his petition, attaching two proposed amended petitions. Doc. No. 56. He filed a concurrent motion to certify the constitutional question to the Iowa Supreme Court. Doc. No. 57. On August 4, 2003, Judge Bennett denied the motion to certify the question, and granted Schneider's motion to amend his petition. Doc. No. 59. Judge Bennett further clarified which of Schneider's proposed amended petitions (Amendment A) he was authorized to file. Doc. No. 63. Therefore, it is Schneider's amended Petition for Habeas Corpus (Amendment A) (Doc. No. 60) that is presently before the court.

On September 2, 2003, Jergens answered the Amended Petition, and renewed his prior motion to dismiss. Doc. Nos. 68 & 69, amended on Sept. 16, 2003, Doc. No. 72. The State of Iowa moved to withdraw as Respondent-Intervenor. Doc. No. 65. Schneider resisted both motions. Doc. Nos. 70 & 71.

On October 14, 2003, Judge Bennett granted the State's motion to be dismissed from the case as Respondent-Intervenor, ordered the parties to amend the caption of the

case to remove the State of Iowa as a party, allowed the State's counsel to withdraw from the case,[2] and denied Jergens's renewed motion to dismiss, "without prejudice to reassertion of a full 'factual challenge' to subject matter jurisdiction based on 'mootness,' for example, on a motion for summary judgment." Doc. No. 74, p. 9. Judge Bennett found that at least in the context of a "facial challenge" to the court's subject matter jurisdiction, a reasonable expectation continues to exist that Schneider would be subject to incarceration for contempt if he again violates the No Contact Order. Judge Bennett noted the record did not contain sufficient evidence for a "factual challenge" to subject matter jurisdiction. *Id.*, p. 8.

Jergens did not seek to renew his motion to dismiss and did not file a motion for summary judgment. However, Jergens once again has raised his mootness challenge to the petition in Jergens's responsive brief on the merits, filed December 8, 2003. *See* Doc. No. 75, section V. Jergens filed an appendix of relevant State court documents on December 10, 2003. Doc. Nos. 75 & 76.

The court now finds the case has been fully briefed and is ready for decision. In his Amended Petition, Schneider asserts five grounds for relief, each of which he supports with a statement of supporting facts. Schneider has framed his grounds for relief as follows:

> A. Ground one: The no-contact order entered on April 1, 1999, was intended to restrict content related speech, and it was not narrowly drafted to affect [sic] the purposes of limiting annoying communications between Dennis Schneider and Debra Rodgers. This denies due process of law to protect fundamental rights of Dennis Schneider without a rational basis or compelling interest. The fundamental rights involved

[2]Although Assistant Iowa Attorney General Thomas Andrews, counsel of record for the State, was allowed to withdraw as counsel for the State of Iowa, he remains an attorney of record for Jergens.

include freedom of speech, freedom of association, freedom of religion, and the right to protect liberty and property.

B. Ground two: The no-contact order of April 1, 1999, is unconstitutionally vague and denies due process of law to Dennis Schneider in that the order fails to provide a procedure by which Dennis Schneider can learn of the presence of Debra Rodgers, in a public facility, and then avoid contact before entering a place, where unknown to the defendant, Debra Rodgers may be present. The order also fails to allow a procedure to apprize Dennis Schneider of Debra Rodgers' place of employment and those hours of employment to allow Dennis Schneider to avoid entry into Debra Rodgers' place of employment when Debra Rodgers is present.

C. Ground three: The April 1, 1999 order, as interpreted by the [Palo Alto County District Court] based on information provided on October 1, 2001, is constitutionally over-broad. It denies Dennis Schneider, in the application, the right to enter a public facility, at a time when Debra Rodgers (the party who sought limitation of contact for oral communications) [is] not present. Dennis Schneider has a fundamental right to freely associate with a family member, specifically his daughter, and deliver to her a certificate of title to a motor vehicle properly endorsed so as to remove Dennis Schneider's name from the motor vehicle and avoid the vicarious liability imposed upon an individual whose name is recorded on a motor vehicle being driven by another person. The order is also over-broad in that it fails to accommodate Dennis Schneider's right to freely associate with family members and other members of the public at public accommodations in Emmetsburg, Iowa. Dennis Schneider resides in Emmetsburg, Iowa and was residing in Emmetsburg, Iowa at the time the no-contact order [was] entered. Debra Rodgers did not reside in Emmetsburg, Iowa but actually resided in Sioux City, Iowa on April 1, 1999. The order is over-broad in that it denies Dennis Schneider the right to enter a location occupied by Debra Rodgers, without giving notice to Dennis Schneider in

advance of the entry that Debra Rodgers is present but subjecting him to punishment for said entry. The order makes no accommodation for Dennis Schneider to enter necessary public facilities such as a church to exercise his first amendment right to freedom of religion, if Debra Rodgers chooses to be present, or to enter a hospital to exercise his right to protect his person from injury or death, if Debra Rodgers is present or obtains employment at the local hospital, [or] to enter an educational institution occupied by a child. No compelling interest exists to limit these rights.

D. Ground four: The [Palo Alto County District Court] on May 1, 2002, entered an order interpreting the April 1, 1999, no-contact order by relying on information presented to the court on October 1, 2001, the date of the contempt hearing. The interpretation given redefined the place of "employment" of Debra Rodgers from the place of employment that she physically had on April 1, 1999. The claim of employment was based solely on Debra Rodgers' testimony without any introduction of documentation from her alleged employer. This interpretation given to the order amounts to an ex post facto law by defining the law to prohibit conduct based on information provided on October 1, 2001, to punish for conduct that occurred on July 7, 2001.

E. Ground five: The no-contact order of April 1, 1999, denies Dennis Schneider the reasonable notice necessary to guarantee minimum due process of law to adequately advise Dennis Schneider as to what conduct would be prohibited prior to committing the conduct.

Doc. No. 60, ¶ 12(A)-(E).

II. PROCEDURAL DEFAULT; EXHAUSTION

Before addressing the merits of Schneider's claims, the court first will consider Jergens's argument that all of the claims Schneider has raised in his Amended Petition are

procedurally defaulted and unexhausted. Jergens argues Schneider never appealed the entry of the No Contact Order to any Iowa court, and if some constitutional infirmity existed on the face of the document, "the time to have raised and preserved any such facial claims of unconstitutionality passed long ago." Doc. No. 75, p. 33.

Jergens argues further that in addition to being defaulted on procedural grounds, Schneider's claims are unexhausted because he has never presented the Iowa courts with an opportunity to rule on his claims. *See id.*, pp. 33-37. Jergens argues that in Schneider's state court filings, he briefly commented that the No Contact order violated his constitutional rights, but he "offered absolutely no explanation, no authorities, no argument, and no discussion to the Iowa district court setting out how the [No Contact] Order or its interplay with the facts of this case violated any of [Schneider's constitutional rights.]" *Id.*, p. 35.

Jergens asserts that once Schneider's procedurally defaulted and unexhausted claims are removed from consideration, all that remains is "some sort of 'as applied' claim," which Jergens argues fails on its merits. *Id.*, p. 34.

Schneider did not file a reply brief, and has not addressed Jergens's procedural arguments.

Pursuant to the Iowa Rules of Appellate Procedure, Schneider had thirty days after entry of the No Contact Order to file an appeal with the Iowa Supreme Court. *See* Iowa R. App. P. 6.5(1). The time period would have been extended if Schneider had filed a valid and proper motion under Rule 1.904(2), Iowa Rules of Civil Procedure, but no such motion was filed. *See id.*; *Turk v. Iowa West Racing Ass'n, Inc.*, ___ N.W.2d ___, 2004 WL 1836119 at *2 (Iowa Aug. 11, 2004) (citing Iowa R. App. P. 6.5; *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998)). Therefore, the last day on which Schneider could have appealed the No Contact Order was April 30, 1999. *See* Iowa R. App. P. 6.5.

Because Schneider did not appeal the No Contact Order, he has procedurally defaulted his claims challenging the substance of the order itself. Schneider has not even attempted to show cause for his failure to appeal the No Contact Order. Accordingly, the court cannot consider his collateral attack on the merits of the order in this action. As the United States Supreme Court has explained, "[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572, 71 L. Ed. 2d 783 (1982); *accord Maynard v. Lockhart*, 981 F.2d 981, 984 (8th Cir. 1992) ("A state procedural default bars federal habeas review unless the petitioner 'can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.' *Coleman v. Thompson*, [501] U.S. [722, 750], 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640 (1991).") "In the absence of a finding of cause and prejudice, a federal court is precluded from reviewing procedurally defaulted claims on its own motion." *Maynard*, 981 F.2d at 985 (citing *Stewart v. Dugger*, 877 F.2d 851, 854-55 (11th Cir. 1989) (subsequent history omitted)).

Three of Schneider's claims for relief -- Grounds one, two, and five -- represent collateral attacks on the substance of the No Contact Order. Those claims should be denied as procedurally defaulted. The remaining two claims also represent attacks on the substance of the No Contact Order, but do so in the context of an "as applied" argument. Schneider argues the No Contact Order, as it was interpreted by the Iowa courts and applied to him, is unconstitutional.

Tt appears that all five of Schneider's claims, including the two "as applied" claims, are unexhausted. Schneider filed a timely appeal of his contempt conviction. When his appeal was rejected by both an Associate District Judge and a District Judge of the Palo Alto County court, Schneider filed a timely appeal with the Iowa Supreme Court. In his

petition for certiorari, Schneider sought review of Judge Lester's decision affirming his conviction, and he raised constitutional claims substantially similar to those he has raised in this action. *See* Doc. No. 1, Ex. 7, "Petition for Certiorari/Application for Stay." Following the denial of his appeal by the Iowa Supreme Court, Schneider did not file a motion for rehearing, nor did he file an application for postconviction relief pursuant to Iowa Code section 822.2.

The question as to whether state post-conviction relief is available to someone challenging a criminal contempt conviction remains undecided. In a prior report and recommendation, Doc. No. 52, the undersigned suggested post-conviction relief would not be available because a criminal contempt conviction did not appear to meet the definition of "public offense" under Iowa law. In his order sustaining the State of Iowa's objections to that report and recommendation, Chief Judge Bennett agreed that the issue is less than clear from existing Iowa case law. Judge Bennett held that "in light of the federal-state comity issues underlying the exhaustion requirement, this court believes that it is proper for the state court to determine, in the first instance, whether or not post-conviction relief proceedings are available for a conviction for criminal contempt." Doc. No. 55 at 12 (citing *Doty v. Lund*, 78 F. Supp. 2d 898, 902 (N.D. Iowa 1999)). Accordingly, it would seem the proper course would be to dismiss Schneider's petition once again, without prejudice, to afford him the opportunity to seek relief through a state post-conviction action. As Judge Bennett noted, "If the state courts determine that a post-conviction relief application will not lie from a conviction for criminal contempt, *then* it will be clear that Schneider has both attempted to exhaust state remedies *and* that the State's post-conviction relief process is 'ineffective' to protect his rights." *Id.* at 13.

Jergens would have the court deny Schneider's petition on the merits because his claims are procedurally defaulted and/or unexhausted. Notably, however, both the

undersigned's report and recommendation discussed above and Judge Bennett's order were entered in the context of Schneider's prior claim challenging the constitutionality of the State of Iowa's review procedure for a criminal contempt conviction. The court has not addressed previously the question of whether Schneider's current constitutional claims are ripe for decision.

The undersigned believes the present situation is similar to the one that existed with respect to Schneider's prior constitutional challenge to the state appellate procedure; that is, as Judge Bennett suggested in a footnote to his June 26, 2003, order, because Schneider's constitutional claims are not plainly without merit, it would be inappropriate to ignore his failure to exhaust and rule on the merits of his petition at this time. *See id.*, n.1. Rather, the undersigned believes the petition should be dismissed without prejudice to allow Schneider to file a post-conviction relief action.

III. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections[3] to the Report and Recommendation in accordance with 28 U.S.C. § 636

[3]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

(b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that Schneider's petition be dismissed without prejudice.

IT IS SO ORDERED.

DATED this 24th day of September, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT